RECORD
AND
BRIEF

No. 16-254

In The

Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas, Fourteenth District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether service by mail comports with the Hague Service Convention.

Whether Québec has adopted the Hague Service Convention so as to permit service of process via mail without going through Canadian and Quebecer government channels.

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STATEMENT OF THE CASE

When petitioner Water Splash, Inc. was unable to serve respondent Tara Menon (a Canadian citizen residing in Québec, Canada) with process, the trial court authorized alternative service by "first class mail, certified mail, and Federal Express to Menon's address" and "by email to each of Menon's known email addresses." A default judgment was entered after Menon was served by the alternative service. Menon filed a motion for new trial wherein she argued that service by mail, Federal Express, or email does not comply with article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Convention"), and therefore, the default judgment should be set aside (CR 499-500). *See* art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. The trial court denied the motion and Menon appealed to the Fourteenth Court of Appeals in Houston, Texas.

In the court of appeals, Menon argued that the trial court's default judgment should be set aside because: (1) article 10(a) of the Convention does not allow for service of process by mail; and (2) the law of Québec, without implementing legislation, does not permit service of process by mail without going through Canadian and Quebecer government channels. The majority opinion of the court of appeals resolved the case under the first argument without addressing the second argument and held that "send" does not include "service of process" and reversed the default judgment. *Menon v. Water Splash, Inc.*, 472 S.W.3d 28, 32 (Tex. App. –

Houston [14th Dist.] 2013, pet. denied). The majority's reasoning is based on what it considered to be the unambiguous text of the Convention. In reaching this conclusion, the court of appeals acknowledged a split of authority across the United States regarding article 10(a) of the Convention with the following language:

> Water Splash argues that article 10(a) allows service of process by mail, and relies on the "majority view" which holds that article 10(a) allows service of process by mail, so long as the state of destination does not object. Courts following this view include the Second, Fourth, Seventh and Ninth Circuits.
>
> We conclude that the better-reasoned approach is to follow the so-called "minority view" which adheres to and applies the meaning of the specific words used in article 10(a) and prohibits service by mail.

Id. (footnotes omitted).

The dissenting opinion, in spite of the clear text of the Convention, would have relied on a variety of extra-textual sources to conclude that "send" includes "service of process" and thereby affirmed the default judgment. *Id.* at 36-39 (Christopher, J., dissenting).

Water Splash filed a motion for en banc reconsideration, and the court of appeals ordered Menon to respond. Menon again argued that the word "send" employed in the Convention does not mean "service of

process," and that the Convention, although adopted by Canada, has not been fully implemented by the province of Québec so as to effectuate service by mail on Menon without going through a Quebec judge or "*l'huisser*," and therefore, the service on Menon by mail was not effective. After the motion for en banc reconsideration was denied without opinion, Water Splash filed a petition for review in the Texas Supreme Court, and Menon was ordered to respond. In her response, Menon again argued that "send" does not mean "service of process," and that the Convention has not been fully implemented by Québec so as to effectuate service by mail on Menon without going through a Quebec judge or "*l'huisser.*" The Texas Supreme Court denied the petition for review without opinion.

Water Splash now argues in its petition for writ of certiorari that this case is a good vehicle to resolve the split of authority regarding whether the Convention authorizes service of process by mail.

REASONS FOR DENYING THE WRIT

I. Introduction.

The Convention provides a means through which parties to civil litigation may serve documents abroad. In this regard, article 10 of the Convention states:

> Provided the State of destination does not object, the present Convention shall not interfere with

> (a) the freedom to ***send*** judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect ***service*** of judicial documents directly through the judicial officers, officials or other competent persons of the State of designation,
>
> (c) the freedom of any person interested in a judicial proceeding to effect ***service*** of judicial documents directly through the judicial officers, officials, or other competent persons of the State of destination (emphasis added).

Of the many other courts throughout the United States that have considered the issue of whether article 10(a) authorizes service of process by mail, their opinions are split. One group of cases holds that article 10(a) does not permit service by mail, but merely provides for the mailing of non-service-related judicial documents. *See, e.g.*, *Nuovo Pignone v. Storman Asia M/V*, 310 F.3d 374, 384 (5th Cir. 2002); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173-74 (8th Cir. 1989); *Riendeau v. St. Lawrence & Atlantic R. Co.*, 167 F.R.D. 26, 29 (D. Vt. 1996) (service in Québec); *Postal v. Princess Cruises, Inc.*, 163 F.R.D. 497, 499 (N.D. Tex. 1995); *Raffa v. Nissan Motor Co. Ltd.*, 141 F.R.D. 45, 46 (E.D. Pa. 1991); *Pochop v. Toyota Motor Company*, 111 F.R.D. 464, 466 (S.D. Miss. 1986); *Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985); *Golub v. Isuzu Motors*, 924 F. Supp. 324, 327 (D. Mass 1996); *Kim v.*

Frank Mohn A/S, 909 F. Supp. 474, 479, and n. 4 (S.D. Tex. 1995); *Mateo v. M/S KISO*, 805 F. Supp. 792, 796-97 (N.D. Cal. 1992); *Arco Elec. Control Ltd. v. Core Intern.*, 794 F. Supp. 1144, 1147 (S.D. Fla. 1992); *Honda Motor Co. v. Superior Court*, 12 Cal. Rptr. 2d 861, 861-84, 10 Cal. App. 4th 1043 (Cal.App.6th Dist.); *Reynolds v. Koh*, 490 N.Y.S.2d 295, 297 (1985); *Ordnandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274, 274-75 (1984).

Another group of cases hold that service under article 10(a) may be made by mail. *Brockmeyer v. May*, 383 F.3d 798, 808-09 (9th Cir. 2004); *Research Sys. Corp. v. IPSO Publicite*, 272 F.3d 914, 916 (7th Cir. 2002); *Koehler v. Dodwell*, 152 F.3d 304, 307-08 (4th Cir. 1998); *Ackerman v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986). The Texas court of appeals in this case joins the courts holding that article 10(a) of the Convention does not permit service by mail, but merely provides for the mailing of non-service-related judicial documents.

At some point, this Court should resolve this split of authorities, but it is suggested that this case is not a good vehicle for doing so because (1) there is an independent ground that was argued throughout the lower court proceedings by Menon and that was not reached by the Texas court of appeals or the Texas Supreme Court upon which the trial court's default judgment should be reversed, and (2) the court of appeals' holding that the Convention does not permit service by mail was correct.

II. The independent ground upon which the trial court's default judgment should be reversed.

Under the Convention, Article 10(a) does not apply where the State of designation objects. In this case, Menon was served in Québec, Canada. Under Canadian law, each province has authority to adopt international treaties such as the Convention. CAN. CONST. (Constitution Act, 1867) ch. VI, §§ 91-95; *Canada Attorney-General for Canada v. Attorney-General for Ontario*, [1937] 1 D.L.R. 673. Canada ratified the Convention and Québec issued on March 30, 1988, a Decree nr 491-88, in which it declared itself bound by the Convention. *See* Gazette Officielle du Québec, April 20, 1988, 120th year, nr 16. Relevant sections of the Québec Code of Civil Procedure (§§ 110-146, 198.1 & 484.1) have been amended to give effect to the Convention. *See* in particular § 136. However, service of process in Québec can be done validly only by using an official process server (*l'huisser*) who then attests that the service has been effected, or by permission of a judge in Québec. *See id.* at §§ 120 & 123. Such a server (*l'huisser*) can be hired by the foreign applicant (that is, Water Splash) directly or by the Québec Department of Justice on the request of a foreign "central authority" in the country of the applicant, following the procedure set forth in the Convention. Therefore, whether service of process by mail is permitted by the Convention or not, and whether Canada objects to it or not is secondary: such service has no legal effect in Québec.

And very importantly, under article 10(a) itself, whether the Convention is valid in the State of destination is governed by the law of the jurisdiction where the procedure takes place, which is that of Québec. In other words, although adopted by Canada, the Convention has not been fully implemented by the province of Québec so as to effectuate service by mail on Menon without going through a Québec judge or a *l'huisser*.

The question, then, is not whether Canada has approved of the Convention, but whether Québec has approved with legislation implementing the convention as required by the Canadian Constitution. Implementing legislation is a key issue regarding the enforceability of international law that has been frequently dealt with by the United States Supreme Court when confronted with cases, like this one, that must cross the preliminary bridge of whether the Convention is even the law of the forum in question. *See Bond v. United States*, 134 S.Ct. 2077, 2093 (2014); *Medíllin v. Texas*, 552 U.S. 491, 508 (2008); *Beard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam); *Vokswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

All of the foregoing was repeatedly raised in the Texas appellate courts. Menon argued in the court of appeals and in the Texas Supreme Court that a litigant may not serve a Canadian citizen and resident of Québec with process by sending citation directly to the Canadian citizen (bypassing traditional diplomatic channels and the Central Authority under the Convention) by mail. In pursuing this issue throughout her

Appellant's Brief filed in the court of appals, Menon summarized at the end of the brief by stating the following:

> Therefore, service by mail, private delivery, and e-mail is not proper because: (1) under Article 138 of the Code of Civil Procedure of Québec because the alternative service in this case was not "obtained in the district of the place in which the written proceeding [was] served." CODE CIV. P. QUÉBEC, art. 138; (2) Quebec appears to have no implementing legislation regarding the Hague Service Convention as required by the Canadian Constitution, in which case, service must be by traditional diplomatic channels (e.g., letters rogatory); and (3) the possible administrative implementation of the Hague Service Convention by Québec as indicated by the Hague Conference website shows that Water Splash, Inc. failed to comply with the Québec regulations regarding service of process. Aplt's Br. at 31-32.

The majority opinion in the court of appeals did not reach or address this issue but rather resolved the appeal by concluding that the Convention does not authorize service by mail, thereby mooting the Québec implementation question. It makes sense that the Texas court would take this approach so as to avoid passing on the unfamiliar territory of Canadian and Quebecer law.

Menon further pursued this point in the Texas Supreme Court by arguing that even if the Convention allows service by mail,

> then this Court should also *either* (1) address the additional question raised in Appellant's Brief but not addressed by the court of appeals regarding whether Québec has approved of the Convention with implementing legislation as required by the Canadian Constitution, *or* (2) remand to the court of appeals for consideration of this question under Rule 53.4 of the Texas Rules of Appellate Procedure.

Water Splash's argument on page 16 of its petition for writ of certiorari that the Canadian and Quebecer domestic law question "has no bearing on whether service of process was proper in this case" is not accurate. The very point of the argument is that it is an independent ground for reversing the trial court's default judgment. Additionally, Water Splash's argument, also on page 16 of its petition, that Menon "conceded that the only question at issue in this case was the federal question [of whether the Convention allows for service by mail] is also not accurate. Menon raised the issue at every level of the state court appellate proceedings. Moreover, the majority opinion specifically did not reach the argument, and therefore, it is an open question if this Court were to reverse the service-by-mail holding.

In short, there is an independent ground upon which Menon would have prevailed in the Texas court of appeals, and therefore, this case is not a good vehicle for addressing the split of authorities on whether the Convention authorizes service of process by mail.

III. The Texas court of appeals' holding that the Convention does not authorize service of process by mail is correct.

The primary thrust of the dissenting opinion of the Texas court of appeals and the authorities relied on by the dissent are that extra-textual sources indicate that the intent of the drafters of the Convention was to authorize service by mail. The majority opinion of the Texas court of appeals and the authorities relied on by the majority are that the clear text of the Convention indicates that the drafters did not intend to authorize service by mail. The United States Supreme Court has time and again said that the beginning point in the construction of a treaty is the text of the treaty itself, and that supplemental means of interpretation (that is, extra-textual sources) should be resorted to only if the ordinary meaning of the text presents an ambiguity or leads to an absurd result. Examples abound:

- *Bond v. United States*, 134 S.Ct. 2077, 2087-90 (2014) (analyzing the ordinary meaning of the term "chemical weapon" contained in the Chemical Weapons Convention and only after concluding that the term is ambiguous resorting to supplemental means of interpretation) and *id.* at 2094 & 2097 (Scalia, J., concurring in judgment) (interpreting a "chemical weapon" solely on the basis of a textual analysis and stating that the Court's other interpretive devices were "unintelligible").

- *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224 (2014) ("For treaties, which are primarily compacts between independent nations, our duty is to ascertain the intent of the parties by looking to the document's text and context.") (citations, brackets, and quotation marks omitted).

- *Medíllin v. Texas*, 552 U.S. 491, 508, 514 (2008) (applying a "time-honored textual approach," the Court found that the failure to use binding language such as "such" or "must" suggested the terms of the treaty created a political rather than a judicial commitment).

- *Alaska v. United States*, 545 U.S. 75, 92-96 (2005) (interpreting treaty term "bay" according to the ordinary meaning mariners apply to the term).

- *Olympic Airways v. Husain*, 540 U.S. 644, 655 (2004) (interpreting treaty terms "under the ordinary and usual definitions of these terms").

- *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (stating that negotiation history may be "consulted to elucidate a text that is ambiguous").

- *Vokswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) ("When interpreting a treaty, we 'begin with the text of the treaty and the context in which the written words are used.'") (quoting

Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522, 534 (1987) and *id.* at 700 ("Other general rules of construction may be brought to bear on difficult or ambiguous passages.").

- *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'") (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)).

- *Factor v. Laubenheimer*, 290 U.S. 276 (1933) (resorting to supplemental means of construing a treaty only after it was clear that the text of the treaty gave rise to an ambiguity).

- *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) ("[a]s treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations'") (quoting *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890)).

Another important point that supports the majority opinion's text-first methodology is international law itself. The Vienna Convention on the Law of Treaties reflects the rules of customary international law applicable to construction of all treaties. VIENNA CONVENTION ON THE LAW OF TREATIES, 1155 U.N.T.S. 331.

See RICHARD K. GARDINER, TREATY INTERPRETATION 7 (2008) ("The International Court of Justice . . . has pronounced that the Vienna rules are in principle applicable to the interpretation of all treaties."). The Vienna Convention provides the accepted international framework for interpreting treaty provisions, and as the International Court of Justice has said, it reflects a codification of the customary international law applicable to all nations. *See Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 37 (Mar. 31); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 43 (July 9); *see also* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, intro. Note, at 144-45 (1987) (discussing the Vienna Convention's codification of the customary international law governing international agreements and the acceptance of the Convention in the United States). The Vienna Convention was an attempt to "codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties." 2 UNITED NATIONS, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 218-19 (1966). The United States has never ratified the Vienna Convention, but it recognizes the treaty as "the authoritative guide to current treaty law and practice." S. EXEC. DOC. NO. 92-1, at 1 (1971). Moreover, the United States routinely relies on the Vienna Convention in litigation before the United States Supreme Court.[1]

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[1] *See* Brief for the United States as Amicus Curiae in Support of Vacatur and Remand, *BG Group PLC v. Republic of Arg.*,

If the United States views the Vienna Convention as the authoritative guide to treaty interpretation, and the Supreme Court accords great deference to the executive branch's interpretation of treaties, then it follows that an interpretive method that is consistent with the Vienna Convention is proper. The majority opinion is exactly in conformity with the Vienna Convention, whereas the dissenting opinion is not.

Article 31 of the Vienna Convention states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." VIENNA CONVENTION ON THE LAW OF TREATIES, art. 31(1). "Context" is defined, among other things, as "the text, including its preamble and annexes." *Id.* at art. 31(2). Context also includes "[a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty" and "[a]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." *Id.* Supplementary means of interpretation are also permitted for limited purposes. Article 32 provides that:

> Recourse may be had to supplementary means of interpretation, including preparatory work of the treaty and the circumstances

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134 S.Ct. 1198 (2014) ; Brief for the United States as Amicus Curiae Supporting Petitioner, *Abbott v. Abbott*, 560 U.S. 1 (2010); Brief for the United States as Amicus Curiae Supporting Respondents, *Sanchez-Llamas v. Johnson* (Nos. 05-51, 04-10566), 2006 WL 271823, at *23.

> of its conclusion, in order to confirm the meaning . . . or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

Id. at art. 32.

The textual focus of the Vienna Convention is clear, allowing for supplementary means of interpretation only after the text of a treaty demonstrates an ambiguity or an absurd result. In others words, the majority properly applies the rules of treaty construction to this appeal, whereas the dissent does not. Moreover, the majority's approach is in conformity with the view of the International Court of Justice as to the proper methodology applied in construing treaties, whereas the dissent's approach is not. *See Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) ("[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur.").

The text of the Convention on the issue of service of process by mail is not ambiguous, and therefore extra-textual materials are irrelevant under Supreme Court cases and international law. The majority opinion in the Texas court of appeals explicitly complied with these authorities and stuck to the unambiguous text of the Convention in its analysis. Accordingly, if

this Court were to accept this case as the vehicle for resolving the split of authority as to whether the Convention authorizes service of process by mail, it would be doing so to affirm what the Texas court of appeals has already held.

CONCLUSION

For the reasons stated herein, Petitioner requests this Court to grant this petition.

Respectfully submitted,

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